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The Terror Exception: The Impact of the 2001 Authorization for Use of Military Force on United States Counterterrorism Policy in the Middle East under the Obama Administration

Benjamin Collinger

In the traumatic and somber aftermath of the September 11, 2001 terrorist attacks, the U.S. Congress passed a critical piece of legislation to provide the president authority to defend the United States and its interests abroad. The Authorization for Use of Military Force (AUMF), which responded to the horrors of 9/11, began the United States' longest war—the global war on terror—and serves as its legal basis today. President George W. Bush signed the AUMF into law on September 18, 2001, only a week after the attacks. Congress agreed with the proposition:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on Sept. 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>1</sup>

The AUMF enabled President Bush to defend the United States against al-Qa'ida and other entities that carried out 9/11. Congress rejected the Bush administration's first draft of the legislation because they believed it was too expansive. The initial wording provided the president with authority "to deter and pre-empt any future acts of terrorism or aggression,"<sup>2</sup> which Congress rejected on the grounds that such language would provide the Executive Branch with power at the expense of Congress. Congress rejected other requests from the Bush administration, including one to transfer appropriations power to the president, and another that restricted Congress' access to classified briefings. The Bush administration also asked for authority to waive restrictions on foreign assistance without notifying Congress, which could unilaterally override Congressional mandates not to assist countries who commit human rights violations, cause nuclear proliferation, and sponsor terrorism.<sup>3</sup> As David Abramowitz, the Democratic Chief Counsel of the House Committee on International Relations, explained at the time, "the requests from the White House in response to this crisis were particularly breathtaking, and the results of many of these proposals were far narrower than those put forth initially by the President."<sup>4</sup> In other words, the rejection by a Congress of expanded executive authority guarded the separation of powers.

Although Congress diluted the Bush administration's original proposals by rejecting what Representatives viewed as unreasonable expansions of executive authority, the AUMF still authorized an entirely new security apparatus designed to fight terrorism. This apparatus has impacted nearly all aspects of the federal government and has created a new power dynamic in public policy. For example, at least 263 organizations have been created or reorganized in response to 9/11 (e.g. The Department of Homeland Security).<sup>5</sup> Additionally, the Bush and Obama administrations' justification for policies like the detention of "enemy combatants" in Guantanamo Bay, drone strikes, and mass data collection, all derive from or were catalyzed by the AUMF. Because it remains the preeminent legal basis for the U.S. global war on terror, the AUMF influences how the United States employs force, cooperates with foreign countries, and treats civil liberties. Today, these subjects create antagonistic international debates about U.S. foreign policy. Yet, while the law's impact now sparks controversy, the 2001 debate in Congress was almost entirely devoid of disagreement.

The AUMF garnered unanimity in the Senate with only one dissenting vote in the House of Representatives. The sole "nay" came from Rep. Barbara Lee, a Democrat from California. On the floor of the House of Representatives three days after 9/11, Lee argued that

We must not rush to judgment. Far too many innocent people have already died. Our country is in mourning. If we rush to launch a counter-attack, we run too great a risk that women, children, and other non-combatants will be caught in the crossfire.<sup>6</sup>

Lee reminded the House how the 1964 Gulf of Tonkin Resolution justified a long and undeclared war in Vietnam. She remarked, "we must be careful not to embark on an open-ended war with neither an exit strategy nor a focused target. We cannot repeat past mistakes."<sup>7</sup> Now fifteen years after the law was enacted, it is critical to examine Rep. Lee's warning to inform future U.S foreign policy in the context of war powers and counterterrorism. Has 9/11 and the AUMF, like the Gulf

of Tonkin incident and resolution, been used to justify an “open-ended war with neither an exit strategy nor a focused target” for counterterrorism in the Middle East?

### **The State of Exception in Counterterrorism**

Counterterrorism has undoubtedly become a centerpiece of U.S. foreign policy in the Middle East. A great deal of U.S. strategy involves intelligence sharing with allies to kill top terrorists.<sup>8</sup> Daniel Byman, Georgetown University professor and senior fellow at The Brookings Institution, argues that the Obama administration’s fixation on counterterrorism often leads the United States to miss broader regional trends that undermine our interests, and overlook opportunities to prevent or mitigate regional conflicts.<sup>9</sup> According to Byman, “Counterterrorism not only explains where Obama has been aggressive; it also explains the limits of where he acts,” such as deploying force to fight al-Qa’ida in the Arabian Peninsula (AQAP) in Yemen, and the Islamic State in Iraq and the Levant (ISIL)<sup>10</sup> within Syria rather than building those countries’ governance and defense capabilities. Moreover, Byman argues that the focus on counterterrorism inflates the threat that terrorism poses to U.S. interests by enflaming a cycle of violence. Threat inflation (often peddled by bellicose leaders) skews public opinion to favor costly action, even when such action may only threaten national security.

To explain the AUMF’s mandate in relation to the phenomenon Byman describes, I turn to philosopher Giorgio Agamben’s framework from *State of Exception* for its fusion of political theory and philosophy in the context of executive power and national security. In reading a wide variety of national security related literature, I have found a stark dichotomy between legal and philosophical argumentation that scholars rarely bridge. This dichotomy reflects Michel Foucault’s observation that on the Right the problem of power is posed in juridical terms (e.g. constitution and sovereignty); on the Left power is posed in terms of the state apparatus (e.g.

culture and institutions).<sup>11</sup> Bridging elements of both in a coherent theory allows us to better contextualize the impact of the AUMF. Using Agamben's *State of Exception* is an inherently Foucauldian project, concerned with examining, "The way power was exercised—concretely, and in detail—with its specificity, its techniques and tactics."<sup>12</sup> Specifically, I will examine the "techniques and tactics" that the Obama administration has used to justify an expansion of executive power and the war on terror vis-à-vis the AUMF.

Agamben explains that leaders often use national emergencies to justify illegal expansions of their power. Such moves create a state of exception where law and praxis blur to a point in which the executive's violent actions exist in a space unchecked by the law.<sup>13</sup> In some instances, one can recognize states of exception fairly easily. For example, take the aftermath of the July 15, 2016 attempted coup against Turkish President Recep Tayyip Erdogan's government. After the coup failed, Erdogan declared a state of emergency which granted him the authority to dismiss more than 100,000 public officials, detain 40,000 citizens, and arrest an additional 32,000.<sup>14</sup> The Turkish President extended the state of emergency for an additional three months, which has enabled him to combat and reduce the power of political rivals across the country.<sup>15</sup> Erdogan's actions obviously exist within a state of exception, but other situations in which executives operate in a lawless vacuum are far less overt and comprehensible; many modern states of exception are less overt and impact fewer people personally. Yet this is not necessarily true in post-9/11 America, where the new security apparatus greatly impacts domestic social relations and foreign policy alike.

Covert expansions of executive power within this apparatus represent the ambiguous space where the AUMF exists: "a space that is neither outside nor inside."<sup>16</sup> I will refer to this legal space as the "extra-legal," where certain actions, though not necessarily directly against the law (illegal),

are in an ambiguous zone prone to exploitation by political actors. My argument is not that political actors should never interpret the law and instead cede all decisions to originalism, but that legal innovation only operates effectively when foundational Constitutional principles guide it. Thus, I will use Agamben's framework to analyze the Obama administration's deployment of the AUMF and determine if such deployment inadvertently justified a permanently escalating war that threatens U.S. national security. If the current application of the AUMF's authority exists in an extra-legal zone that promotes executive overreach in foreign affairs, it may be inconsistent with our Constitutional principles.

### **Presidential War Powers and the AUMF**

Policymakers should first evaluate the AUMF debate within the context of the U.S. Constitution, because Article I gives Congress power to "provide for the common Defence and general Welfare of the United States;<sup>17</sup> ...declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;<sup>18</sup> raise and support Armies;<sup>19</sup> ...provide and maintain a Navy" and other specific duties. Article II positions the president as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."<sup>20</sup> While the president has the authority to direct the armed forces once they are engaged in conflict, the Constitution does not grant the president the authority to initiate force unless Congress has permitted it. The Constitution reflects the founders' belief that war is a collective decision to be checked and balanced by the republic,<sup>21</sup> because following the experience of tyrannical English rule, the founders rejected extensive executive power.<sup>22</sup> Until the second half of the twentieth century, Congressional authorizations preceded executive military actions,<sup>23</sup> a norm that changed in 1950 when Truman began American involvement in the Korean War via the United Nations. Although Congress recaptured its

traditional war making duty by passing the Gulf of Tonkin Resolution in 1964, the Johnson and Nixon administrations applied the law at the expense of Congressional authority.

With eerily similar language to the AUMF, the Gulf of Tonkin Resolution stated

That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.<sup>24</sup>

While President Johnson told Congress that “the United States intends no rashness, and seeks no wider war” the resolution provided the authority for a decade of U.S. military involvement in Vietnam intended to “bring about the end of Communist subversion and aggression”<sup>25</sup> without a declaration of war from Congress. In brief, Vietnam provoked massive backlash from civil society which led to the repeal of the Gulf of Tonkin resolution in 1971 and passage of the War Powers Resolution (WPR) in 1973. The WPR has two key components: the 90-day limit, and the clear statement rule. First, sections 4(a)(1) and 5(b) limit the use of executive force to a maximum of 90 days without an authorization from Congress; second, section 8(a)(1) states that the executive cannot infer Congressional approval without a specific statement authorizing such approval: silence is not consent.<sup>26</sup> As a result of the WPR, the long shadow of Vietnam legally shapes all debates on the executive’s use of military force.

After learning the lessons of Vietnam, Congress intended for the 2001 AUMF to “constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution” and noted that the new law does not supersede the WPR.<sup>27</sup> But the age of fragmented terrorist networks and drone warfare places the WPR’s purpose—to keep war-making in Congress’ realm—in an ambiguous zone because the president now exercises more national security authority (e.g. through unilateral counterterrorism operations such as drone strikes).<sup>28</sup> Given the debates in both the Vietnam and 9/11 eras, the 2001 AUMF begs important questions regarding how executive use of military force legally occurs. To begin, we must explore the development of



the AUMF under the Obama administration, because most of the law's legal and practical development have occurred during Obama's tenure. Curtis A. Bradley at Duke Law School and Jack L. Goldsmith at Harvard Law School, argue that

almost every issue about the AUMF's meaning and scope remained unresolved at the end of the Bush presidency. It was during Obama's time in office, guided by his Administration, that courts construed the AUMF to resolve many of its ambiguities and uncertainties, and that Congress ratified the basic framework of these judicial interpretations.<sup>29</sup>

Identifying the Obama administration's "distinctive contributions made to AUMF jurisprudence," Bradley and Goldsmith note is, "a necessary prerequisite to any normative assessment of the evolution of this body of law."<sup>30</sup>

### **Distinctive Contributions**

The Obama administration's "distinctive contributions" occurred primarily in response to the global war on terror's volatility. Terrorist groups in the Middle East have divided, fragmented, and coalesced to produce unpredictable results. Change has been driven partly by U.S. counterterrorism policy to eliminate important leaders and make alliances of convenience, but fragmentation has also occurred in response to social instability. For example, the U.S. alliance with Iraqi Prime Minister Nouri al-Maliki and resulting sectarian instability are the proximate causes of the rise of ISIL. Emma Sky, a British representative of the Coalition Provisional Authority in Kirkuk in 2003 and political advisor to U.S. General Ray Odierno from 2007-2010, argued that in 2013, President Obama "appeared to be paying scant attention to Maliki's growing authoritarianism and the deteriorating situation in the country."<sup>31</sup> This inattention enabled Maliki to detain thousands of Sunnis without trial, push "leading Sunnis out of the political process by accusing them of terrorism, and [renege] on payments and pledges to the awakening members who had bravely fought al-Qaeda in Iraq..."<sup>32</sup> As a result, ISIL was able to capitalize by claiming to be defenders of the Sunnis against the Shia Maliki government. While Sunni tribes previously

supported by the U.S. military, “had contained and defeated al-Qaeda in Iraq...those same tribes were cooperating with [ISIL] in a popular uprising against the central government...[because] they saw [ISIL] as the lesser of two evils when compared with Maliki.”<sup>33</sup> In other words, the U.S. alliance with Maliki contributed to our misreading of formerly friendly Sunni tribes and led to a strengthened ISIL and Iraq’s unraveling.

Before ISIL’s formal creation in 2013, several organizations established themselves as offshoots of al-Qa’ida. For example, AQAP formed in 2009 by merging al-Qa’ida branches in Saudi Arabia and Yemen, and the Somali group Al-Shabaab formally joined al-Qa’ida in 2012.<sup>34</sup> Thus, even before the emergence of ISIL, U.S. counterterrorism policy required significant flexibility to respond to the shifting landscape of al-Qa’ida operatives. In this context, it seems reasonable for the public to entrust the president with power to defend U.S. interests as circumstances change and groups such as ISIL fragment. This argument—rooted in the constitutional provision of the president as Commander in Chief—serves as a key premise in this debate and tacitly frames many of the Obama administration’s positions. Yet, before we explore the AUMF’s implications for ISIL today, we must explore the legal debate surrounding the AUMF.

The Obama administration has publicly detailed its interpretation of the AUMF in speeches and court briefings. Jeh Johnson, the Secretary of Homeland Security, delivered two speeches on the subject. When he was General Counsel of the Department of Defense in 2012, Johnson told Oxford University students how the fight against al-Qa’ida relies on “conventional legal principles found in treaties and customary international law,” despite the conflict’s unconventional nature. Citing *Hamdi v. Rumsfeld*, the Supreme Court decision that established the legality of Guantanamo Bay detentions, Johnson noted that the United States is engaged in an armed conflict with al-Qa’ida, thus, the international law of armed conflict applies.<sup>35</sup> Similarly, when he was attorney

general, Eric Holder remarked in 2012 at Northwestern University that, “We are a nation at war. And...we face a nimble and determined enemy that cannot be underestimated.”<sup>36</sup> Yet to many, the war on terror does not resemble war or “armed conflict”; it is fought in an ad hoc manner against multiple enemies instead of a singular state, American society has not been mobilized en masse,<sup>37</sup> and territorial boundaries of the conflict are unclear. Therefore, defining counterterrorism in terms of “armed conflict” seems contrived because it assumes parallels that do not exist.

Since neither the Geneva Conventions nor subsequent developments in customary international law clearly define the term “armed conflict,”<sup>38</sup> the Obama administration’s legal innovations placed counterterrorism operations under the laws of war. However, other countries differ as to whether terrorism counts as “armed conflict.” For example, when the United Kingdom and France ratified Article 1 (4) of an additional protocol to the Geneva Convention, they noted in a reservation that the term “armed conflict” is distinct from ordinary crimes, including acts of terrorism, whether they are isolated or part of a concerted effort.<sup>39</sup> This reservation was informed by the argument that “The Troubles,” a tumultuous time in Northern Ireland from 1968 to 1998 that killed 3,600 and injured over 50,000,<sup>40</sup> was not an “armed conflict.” Although the United States did not concur and the reservation is not binding, the reservation is significant for at least three reasons.

First, the reservation makes Johnson’s portrayal of international consensus on the laws of war problematic; not all countries believe in the Obama administration’s premise that acts of terrorism trigger the law of armed conflict. As a result, Obama administration officials’ statements seem less credible and universal. Second, if the British and French interpretation were binding, it would remove key premises based on international law that the United States depends upon to

conduct counterterrorism operations legally. One example of this international legal dependency is the Supreme Court's opinion in *Hamdi*. The court concluded that

detention is authorized is based on the necessary and appropriate force language of the AUMF. It is been long recognized that preventive detention for the duration of the act of hostilities on a traditional battle field is a necessary and appropriate incident of war.<sup>41</sup>

The Supreme Court's justification for deeming detentions legal is that detaining enemies during war is standard international practice, thereby centralizing international laws of war in the decision's reasoning.<sup>42</sup> Yet without the premise that the U.S. is at war with al-Qa'ida (which the court determined), the U.S. could not apply the international law of armed conflict. As a result, all actions that derive legality from the law of armed conflict (e.g. the conditions for detention to be legal at Guantanamo Bay which the Supreme Court affirmed in *Hamdi*) would be illegal if this premise did not exist.

Third, the United Kingdom's interpretation stems from terrorist attacks on home soil that are very similar to attacks and conditions that the United States has experienced. Neither the Irish Republican Army nor al-Qa'ida are states, the conflicts in both countries continued for an extended period of time, and both conflicts greatly impacted their respective societies. Given these circumstances, it would not be unreasonable for the United States to adopt the United Kingdom's interpretation and deem acts of terrorism distinct from "armed conflict." But there are notable differences: the U.S. fight is international; the actors' demands and capabilities are different; the defense mechanisms are different. Thus, the Obama administration's deployment of the law of armed conflict innovated in an underdetermined area of law. In this area, Eric A. Posner at the University of Chicago, argues that

the US should not consider itself governed by the laws of war in its conflict with al Qaeda, as they are normally understood, but it should be alert for opportunities for creating implicit norms of conduct that serve the American interest.<sup>43</sup>

Since the law is sufficiently ambiguous, it can be appropriated for a wide range of legal purposes. Yet while extensive executive power serves short term security interests, deference to the executive neglects the Constitution and civil liberties in the long term. Given these facts, will post-9/11 counterterrorism efforts always be considered part of an “armed conflict”?

### **The Tipping Point**

Jeh Johnson, clarifying the parameters of counterterrorism, acknowledged that the conflict against terrorists will eventually lose the status of “armed conflict.” He stated that there will come

a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.<sup>44</sup>

At the tipping point, Johnson reasons that American efforts could no longer be considered part of an “‘armed conflict’ against al Qaeda and its associated forces; rather, a counterterrorism effort against individuals who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda...in cooperation with the international community...”<sup>45</sup> Once counterterrorism efforts no longer comprise “armed conflict” (which means that they do not fall under international humanitarian law) international criminal law could be deployed to prosecute terrorism.

Specifically, the international community could draw upon jurisprudence from the Special Tribunal for Lebanon (STL) to prosecute terrorism. The STL, a tribunal formed by a 2007 treaty between the United Nations and Lebanon to prosecute the perpetrators of the terrorist attacks that killed former Lebanese Prime Minister Hariri, offers several important contributions to counterterrorism after the tipping point. First, the STL exercises jurisdiction solely over domestic crimes, and is the first international tribunal to do so.<sup>46</sup> This arrangement was created as a compromise intended to safeguard the physical tribunal (by placing it in The Hague) due to Lebanon’s instability, while also legitimizing Lebanese law. Thus, the STL set a precedent for

international tribunals to prosecute terrorism in unstable countries. Second, the STL provides jurisprudence to internationalize the Lebanese definition of terrorism which helped to “fill the gaps in the evolving definition of terrorism as an international crime.”<sup>47</sup> As a result, the international community has a more stable body of law to prosecute terrorism under international criminal law. Third, the STL established clearer jurisprudence for the international courts to deal with terrorism. The International Criminal Court, or a new court developed exclusively to prosecute terrorism cases, could provide a neutral forum that is distanced from nation-level conflict (as existed in Lebanon). Further, such a court could provide a solution to terrorism cases where several states have overlapping jurisdiction.<sup>48</sup> But this scenario is contingent upon the end of terrorism as “armed conflict,” and the consent of states to cede jurisdiction to international courts. Such concessions are unlikely given growing hostility to international institutions like the International Criminal Court.<sup>49</sup> Moreover, the United States is unlikely to declare the end of “armed conflict” any time soon because that assumption provides the needed legal cover of international humanitarian law.

It is unclear if the conflict against al-Qa’ida and its associated forces will *ever* end. Given the conflict’s unconventional and inherently asymmetric nature, it is more likely that terrorist groups will continue to adapt rather than formally stop fighting. For this reason, the United States can reasonably claim that an armed conflict with al-Qa’ida and affiliates will exist indefinitely. Officials may never transition to international criminal law so that they can maintain the authority to use military force. James Clapper, the Director of National Intelligence, recently told the Senate Armed Services Committee that al-Qa’ida affiliates “have proven resilient and are positioned to make gains” despite counterterrorism efforts that have degraded the leadership in Afghanistan and Pakistan.<sup>50</sup> Thus, there is neither a consensus on how the war on terror could end, nor transition strategy for when the tipping point arrives. As a result, the United States is likely to be engaged in

a long-term conflict where strategy is built on the threat-inflating assumption of “armed conflict.” Threat inflation can result in hawkish interventions against fragmented forces that are at best tangentially associated with al-Qa’ida, creating a cycle that fuels violence and executive overreach.

### **Fragmentation and Associated Forces**

Examining the fragmentation of al-Qa’ida first requires understanding the significance of an “associated force,” and how the Obama administration deploys the term. In 2012, Jeh Johnson defined an “associated force” by two characteristics: “(1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners.”<sup>51</sup> However, the Executive Branch initially presented the reasoning of “associated force” in the 2009 D.C. Circuit Court of Appeals case *Al-Bihani v. Obama*, a case concerning a Yemeni Guantanamo detainee who appealed the denial of his petition for a writ of habeas corpus.<sup>52</sup> Given that “associated forces” was not included in the original AUMF, *Al-Bihani v. Obama* was the first time that the government considered the phrase in public. The administration decided to present the phrase to legally account for the fragmentation of al-Qa’ida. The court did not contest the phrase, and chose to defer to the administration’s definition. Since the D.C. Circuit Court of Appeals has the authority to review acts of the federal government (even before Congress provided it with special jurisdiction in 1962), the panel’s decision set a precedent.<sup>53</sup> The decision effectively added “associated forces” to the AUMF’s original defensive mandate to go after the “nations, organizations, or persons...[who] planned, authorized, committed, or aided the terrorist attacks that occurred on Sept. 11, 2001.”<sup>54</sup> The court’s deference to the executive’s interpretation was a de-facto seal of approval that the administration would summon for legitimacy, although the definition of “associated forces” was never debated in Congress nor contested by the court.

Yet at the same time the court supported the validity of “associated forces,” it contradicted the administration’s justification for using the phrase. The theory behind “associated forces” is the concept of “co-belligerency” from the international law of neutrality.<sup>55</sup> Under the law of neutrality, “states engaged in an international armed conflict are allowed to consider third-party states as co-belligerents of the enemy and thus subject to attack.”<sup>56</sup> Before attacking suspected co-belligerents, third-party states must be given a chance to declare their neutrality before they can be declared enemies.<sup>57</sup> Al-Bihani argued that because he was not given a chance to declare his neutrality, he was unlawfully detained under the laws of war.<sup>58</sup> The court rejected Al-Bihani’s arguments with two rebuttals. First, the court argued that the doctrine of co-belligerency, which was derived from outdated notions of state-centric international relations, could not be applied to a world defined by non-state actors. Deploying the concept today would require false equivalencies because states no longer occupy the same space in the world. Second, the court argued that Congress never intended the international laws of war bind the AUMF:

There is no indication in the AUMF, the Detainee Treatment Act of 2005...or the MCA of 2006 or 2009, that Congress intended the international laws of war to act as extra-textual limiting principles for the President’s war powers under the AUMF. The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts.<sup>59</sup>

If the court found “no indication” in the relevant laws “that Congress intended the international laws of war to act as extra-textual limiting principles for the President’s war powers under the AUMF,” the president cannot legitimately use international law to justify his actions. Ironically, in the process of attempting to grant the executive more authority, the court’s ruling did the opposite by dashing the legitimacy of the Executive Branch’s deployment of international law. The court’s arguments stand at odds with Jeh Johnson and Eric Holder’s arguments that utilize international law as key premises for U.S. military force.<sup>60</sup> It also contradicts the Supreme Court’s ruling in *Hamdi*, which used international laws of war to justify the detention of enemy



combatants. Further, when the court denied en banc review, they stated “the panel’s discussion of [the relevance of international-law-of-war principles to the AUMF] is not necessary to the disposition of the merits,”<sup>61</sup> which reaffirmed the idea that international law was not a source of authority for U.S. courts.<sup>62</sup> The court’s ruling on the significance of international law for the AUMF explains why the Supreme Court denied the case certiorari; the justices thought that the lower court settled the laws in question.<sup>63</sup> In other words, the courts agreed that the source of the president’s authority vis-à-vis the AUMF was not from international law, even if international laws of war apply to conduct elsewhere. And since “associated forces” had not been debated by Congress, the administration’s actions existed in an extra-legal zone unregulated by both international and domestic law.

Let us assume that international law in this case is authoritative so that we can examine how the Obama administration deploys the concept of co-belligerency. Jens D. Ohlin at Cornell explains two problems with applying co-belligerency and the international laws of neutrality to the war on terror. First, it is unclear how the required provision for third-party states to publicly declare their neutrality applies to individual terrorists such as Al-Bihani. Ohlin notes that suspected terrorists “are not given the formal opportunity to declare their neutrality, nor are they given a conventional form of notice that they are being declared a co-belligerent of Al Qaeda”<sup>64</sup> before being attacked. Second, applying co-belligerency to non-state terrorist networks assumes homogeneity in goals and methods. While two groups may both be fighting against the United States, they could also be fighting each other. This exact dilemma occurred when al-Qa’ida’s Syrian affiliate, Nusra Front, started to compete with ISIL.<sup>65</sup> While both ISIL and al-Qa’ida want an Islamic state, they are fighting against each other for territory in Syria. Charles Lister, a Senior Fellow at the Middle East Institute, explained that

the Islamic State's proclamation of a caliphate in June 2014 posed a substantial challenge to the jihadi credibility of Nusra Front, which until that moment had controlled no territory unilaterally, frequently cooperated with nationalist forces to govern areas, and was only imposing a bare minimum of sharia law.<sup>66</sup>

In other words, the groups have different goals and methods despite fighting the same enemy. The nature of the conflict and actors involved renders the international law of neutrality obsolete, thereby removing the legitimacy of the "co-belligerency" rationale for "associated forces"

However, Congress included "associated forces" within section 1034 of the Fiscal Year 2012 National Defense Authorization Act (NDAA).<sup>67</sup> The bill states that Congress "supports the Executive Branch's interpretation" of "associated forces" provided in a 2009 filing before the D.C. District Court in *Al-Bihani v. Obama*. Yet that interpretation provides little guidance as to what "associated forces" means, or how government should apply it. In fact, the administration's filing dodged both questions:

It is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of "substantial support," or the precise characteristics of "associated forces," that are or would be sufficient to bring persons and organizations within the foregoing framework.<sup>68</sup>

In other words, the Executive Branch kept the definition and application of both terms vague so that they could apply them flexibly. Rep. Howard Berman, a Democrat from California, and Rep. Chris Van Hollen, a Democrat from Maryland, excoriated Congress for considering section 1034 without specifically defining "associated forces," and not holding a single hearing on the matter.<sup>69</sup> Robert M. Chesney at the University of Texas and Former Advisor to the Detainee Policy Task Force, explained to the House Armed Services Committee why the inclusion of "associated forces" is problematic. Since,

Section 1034 does not define "associated forces," ...this issue would remain as problematic under 1034 as it does under the current AUMF... [because] we would still lack a clear metric as to when an affiliated or related entity becomes an 'associated force' of al Qaeda.<sup>70</sup>

Chesney extended this argument in 2013 (unsatisfied by the administration's clarifications in speeches) by stating that the administration's approach is ambiguous because it does not outline

the initial question of how to determine whether a particular group is part of al Qaeda to begin with, bearing in mind the fragmentation trend. And it also will be of little use if and when we reach the point that al Qaeda itself is effectively destroyed, thus removing the predicate for a co [-] belligerency type of analysis.<sup>71</sup>

This ambiguity may cause administration officials to make decisions about which groups fall under the AUMF without the consent of Congress. Acting on such decisions would exploit the AUMF's authority at the expense of the separation of powers in the name of national security.

Stephen Preston, the General Counsel of the Department of Defense, demonstrated the concrete implications of this deference to the executive when he testified to the Senate Foreign Relations Committee in 2014. Preston explained;

the determination that a particular group is an 'associated force' is made at the most senior levels of the U.S. Government, following reviews by senior government lawyers and informed by departments and agencies with relevant expertise and institutional roles, including all-source intelligence from the U.S. intelligence community.<sup>72</sup>

It is undoubtable that one's analysis of this issue would be different if he/she were privy to classified information. Within this context, it becomes clear that the way the executive decides to strike "associated forces" is unilateral. The decision making process that Preston described exemplifies William B. Quandt's analysis of how "bureaucratic politics" can impact a president's foreign policy: competing organizations and the sometimes-unreliable flow of information make policy outcomes unpredictable.<sup>73</sup> As a result, the process by which a group is determined to be an "associated force" is opaque and likely to generate unpredictable results, especially in the era of drone warfare.<sup>74</sup> Therefore, the status quo incentivizes an exploitation of the AUMF because the administration's control of the law is unchecked by Congress.

This episode demonstrates that the definition of and justification for "associated forces" exerts the "force of law without law."<sup>75</sup> If international laws are not applicable, but the executive's reasoning is contingent on those laws, and the court and Congress *still* defer to the executive's definition, it is applying no law except that which was generated by the executive. The courts and Congress effectively allowed the executive to declare war against an indefinite set of groups

without the specific consent of Congress—the only federal government branch that the U.S. Constitution endows with war making authority<sup>76</sup>—by deferring critical legal questions about the nature of “associated forces”. The courts likely deferred because they viewed the definition as something for the political branches to determine; Congress deferred due to gridlock produced by differing views on war powers. But if Congress continues to defer to the executive in this manner, the results could be an unchecked expansion of the war on terror. The fragmentation al-Qa’ida and the emergence of ISIL as a result creates instances for U.S. presidents to exploit the ambiguity of “associated forces” and fight without Congressional authorization for extended periods of time.

### **Is ISIL an Associated Force of Al-Qa’ida?**

A September 2014 leaked document from the Obama administration provides background on ISIL’s complex formation and emergence. In 2003, a group called Jama’at al-Tawhid w’al-Jihad, which was led by Abu Musab al-Zarqawi, merged with al-Qa’ida.<sup>77</sup> Although bin Laden and al-Zarqawi met in Kandahar, Afghanistan in 1999,<sup>78</sup> it was not until 2004 that al-Zarqawi officially pledged his group’s allegiance to bin Laden and became al-Qa’ida’s leader in Iraq (AQI).<sup>79</sup> After a U.S. airstrike killed al-Zarqawi in 2006, his successor Abu Ayyub al-Masri (who worked in the same group as al-Zarqawi in the 1980s) rebranded AQI as the Islamic State of Iraq (ISI), and focused on exporting terror globally. Not long thereafter, al-Masri reaffirmed his *bayah*, or oath of loyalty, to bin Laden, and also pledged to Abu Omar al-Baghdadi—his partner in ISI. Al-Masiri wanted to retain ties to AQI while exploring a secession so that he could lead an independent group. As Michael Weiss and Hassan Hassan analyzed, “In jihadist terms, this was like taking a mistress and presenting her as your second wife to your first.”<sup>80</sup> In retrospect, al-Masiri’s decision to pledge his loyalty to two organizations foreshadowed the severance between

ISIL and al-Qa'ida. After both al-Masri and al-Baghdadi were killed in an April 2010 U.S.-Iraqi operation, the severance process began.

Abu Bakr al-Baghdadi took the leadership of ISI following his predecessors' death, and in 2011 he assigned ISI member Muhammad al-Jolani to begin an operation in Syria known as the Nusra Front.<sup>81</sup> In April 2013, al-Baghdadi announced the official merger between the two organizations under one name, the Islamic State of Iraq and the Levant [ISIL].<sup>82</sup> This decision catalyzed a major dispute between the newly formed group and al-Qa'ida. Ayman al-Zawahiri, the current leader of al-Qa'ida, disavowed both groups in a statement via *Al Jazeera*. Al-Zawahiri argued that Al-Baghdadi was, "wrong when he announced the Islamic State in Iraq and the Levant without asking permission or receiving advice from us and even without notifying us," and al-Jolani was "wrong by announcing his rejection to the Islamic State in Iraq and the Levant, and by showing his links to al-Qaeda without having our permission or advice, even without notifying us."<sup>83</sup> Essentially, al-Zawahiri "'dissolved' ISIS and ordered both ISI and al-Nusra back to [their] geographically delimited corners, one having control over Iraq, the other over Syria."<sup>84</sup> Al-Baghdadi defied the order by critiquing al-Zawahiri's deference to the West's artificial state borders from Sykes-Picot.<sup>85</sup> Al-Baghdadi's statement delegitimized al-Zawahiri's claim as the leader of global jihadism and signaled an important ideological shift. In response, al-Qa'ida formally severed from ISIL in February 2014: "ISIS is not a branch of [al-Qa'ida], we have no organizational relationship with it, and [we] are not responsible for its actions."<sup>86</sup> This statement reflected the distance between the groups and catalyzed conflict.

Since their official split in 2014, ISIL and al-Qa'ida have been in conflict and competition for territory, legitimacy, and the identity of global jihadism. But ISIL was already functionally independent from al-Qa'ida before the official split.<sup>87</sup> ISIL's declaration of the Islamic caliphate

simply, “proclaimed that all previous loyalties were voided” and demanded global jihadi groups to swear loyalty to al-Baghdadi, thereby upending the al-Qa’ida’s affiliate structure.<sup>88</sup> The Obama administration argues that this split

does not remove ISIL from coverage under the 2001 AUMF because ISIL continues to wage the conflict against the United States that it entered into when, in 2004, it joined with bin Laden and al-Qa’ida in their conflict against the United States.<sup>89</sup>

But this reasoning assumes that ISIL was fully constituted as the same group, with the same ideological goals, leadership and similarities to al-Qa’ida at the time and since 2004. But as I have outlined, there are and were significant differences from the very beginning (e.g. functional independence, different leadership, contrasting methods) that should require a different approach.

Not only did ISIL upend the previous affiliate structure, the three fundamental ways that the group differs (both then and now) from its predecessor demonstrate why it is difficult to consider them “associated forces.” First, they oppose each other’s approach to the creation of an Islamic caliphate. ISIL believes that military liberation should precede an ideological transformation; al-Qa’ida believe the opposite.<sup>90</sup> Divergent ideological stances explain why al-Qa’ida split from ISIL immediately after ISIL declared a caliphate, and speaks to a deep religious difference between the groups. While al-Qa’ida’s strategy, ideology, and messaging were “predicated on the expectation that it would not take power,” ISIL rejected this as defeatism and tried to implement their vision immediately.<sup>91</sup> Not only do they have completely different ideological approaches, they are now fighting each other in Syria. Second, the threat from ISIL is completely different than that of al-Qa’ida. Audrey K. Cronin at George Mason University, in an article titled “ISIS is Not a Terrorist Group,” went as far as to say that ISIL “is not an outgrowth or a part of the older radical Islamist organization, nor does it represent the next phase in its evolution.”<sup>92</sup> Since ISIL behaves more like a “pseudo-state led by a conventional army,” the strategies that have contained al-Qa’ida, which acts more like a guerilla force, will not stop ISIL.<sup>93</sup>

It is possible that the international counterterrorism will degrade ISIL to a point at which the group can be fought as a guerilla force and prosecuted under international criminal law. But for the time being, the U.S. requires an entirely new strategic framework—military and legal—to combat the new threat. The stark differences between ISIL and al-Qa’ida disqualify the two as “associated forces” or “co-belligerents” (terms which the courts rejected the international legal basis for) and demonstrate that Washington requires a new military and legal strategy to account for a change.

### **The Extra-Legal War**

Despite immense changes in the terror network’s ideologies and capabilities, the AUMF is still construed as the operative framework for the war on ISIL. The Obama administration does not believe that the president loses authority to fight ISIL vis-à-vis the AUMF,

simply because of differences between the group and al-Qa’ida’s current leadership. A contrary interpretation of the statute would allow al-Qa’ida and its co-belligerents—rather than the U.S. President and Congress—to control the scope of the AUMF by splintering into rival factions while still continuing to prosecute their same conflict against the United States.<sup>94</sup>

Rather than ceding the terms of conflict to terrorists because of cursory leadership squabbles, the administration argues, the president and Congress should dictate the terms. But as detailed above, it is clear that the two groups have differences that extend far further than the leadership. Moreover, Congress does not currently control the scope of the AUMF. The administration’s notion that a contrary interpretation would incentivize groups to split into rival factions to control the scope of the AUMF is misguided; if anything, a contrary interpretation would allow congress to control the scope of the law by requiring new legislation to account for changing terror networks. The administration’s argument neglects the fact that groups only split when *fundamental* ideological differences exist (e.g. how a caliphate is to be declared). It is not practical or in the best interests of the groups to split into infinite factions. If they did so, the groups would lose fighting power and the ability to draw on a larger network. The split of ISIL from al-Qa’ida is distinct from

factions forming branches to carry out the mission of the group at large; the latter indicates true association and ideological alignment, while former does not. Third, ISIL's military might makes it a completely different enemy from al-Qa'ida. These are reasons why al-Qa'ida affiliates and ISIL should remain distinct in U.S. policy and indicate that the war on terror has evolved faster than the legal basis on which it is fought.

President Obama tacitly distanced the fight against ISIL from the 2001 AUMF when he presented a new AUMF to address ISIL in February 2015.<sup>95</sup> Obama explained that although he believes that existing statutes provide enough authority, a new authorization would provide flexibility to utilize special operations to eliminate ISIL's leaders. Obama was committed to "refine, and ultimately repeal, the 2001 AUMF" and pointed out the need to more specifically tailor the 2001 AUMF's authority to fit the present conflict.<sup>96</sup> In other words, Obama recognized the ambiguity of applying the 2001 AUMF to the conflict against ISIL. Secretary of State John Kerry echoed this sentiment to the Senate Foreign Relations Committee by framing his argument for a new AUMF as "a clear and formal expression of this Congress's backing at this moment" to "dispel doubts that might exist anywhere that Americans are united in this effort."<sup>97</sup> Congress' constitutional duty demands a debate on the proposal.

Since Obama's proposal has not yet left committee, there has been no such formal expression of Congressional backing. As a direct result, U.S. Army Captain Nathan Smith, an intelligence officer stationed in Kuwait, challenged the legality of the war against ISIL. Given that the president did not receive specific authorization from Congress for his actions against ISIL within 90 days, Smith argues that the fight against ISIL is illegal under the WPR. An amicus curiae brief submitted for Smith by Michael J. Glennon, a Professor of International Law at the Fletcher School of Law and Diplomacy at Tufts University, succinctly rebuts the Obama administration's



case on the WPR's clear statement and 90 day rules.<sup>98</sup> And given the court's reasoning in *Zivotofsky ex rel. Zivotofsky v. Clinton*, Glennon argued that Smith's case could not be considered a political question in the exclusive domain of the executive. In *Zivotofsky*, the court reasoned that if it abdicated its responsibility to determine whether a statute was constitutional, it would transfer that authority to the executive and upend the separation of powers. If the court defers to the executive in this case, the court could consent to vast new executive war powers without Congressional approval.

While Glennon presents a convincing case, he misses one key point. The Obama administration can claim that Congress authorized war against ISIL when it passed the National Defense Authorization Act of 2012 and included the phrase "al Qaeda, the Taliban, and associated forces," which it now construes to also include ISIL. Chesney's analysis about the ambiguity of applying this phrase, which I have detailed above, demonstrates a violation of the WPR's clear statement rule. First, the clear statement rule requires application from a specific resolution ("associated forces" was not in the original 2001 AUMF) and that the statute authorize force with respect to a particular conflict. Second, the clear statement rule also *prohibits* the executive from inferring a clear statement from "any provision contained in any appropriation Act" when that provision does not authorize the introduction of U.S. forces into conflict.<sup>99</sup> Since the sole legislation that affirmed "associated forces" (where ISIL fits) comes from an appropriations act (the NDAA of 2012), the term cannot be construed as Congressional authorization against ISIL under the WPR. Therefore, the Obama administration has violated the WPR, placing anti-ISIL operations in an ambiguous extra-legal zone, neither inside nor outside the law, due to judicial and legislative deference. The administration's actions come under the force of law when the courts and Congress say that they are illegal.<sup>100</sup>

## Conclusion

If Congress and the courts permit such ambiguity to continue, it will enable a more hawkish administration to, as Rep. Lee said, continue an open-ended war “with neither an exit strategy nor a focused target.” Given president-elect Trump’s bellicosity and propensity to appoint foreign policy advisers that subscribe to an extreme version of the “clash of civilizations” theory,<sup>101</sup> which will enflame the war on terror on both sides, Congress must reclaim its power to check the executive. Congress can do so by passing a specific authorization that provides flexibility to fight terrorism without sacrificing constitutional principles and risking the lives of American servicemen and women.<sup>102</sup> In the same way that contrived legal interpretations enabled unpredictable events, it is impossible to predict how future administrations may continue the current state of exception. Since only access to classified materials could fully answer the original question of this paper, it is difficult to completely assess exactly how law was or was not applied. Yet, this is precisely my argument: the state of exception operates covertly, wherein,

The normative aspect of law can...be obliterated and contradicted with impunity by a governmental violence that—while ignoring international law externally and producing a permanent state of exception internally—nevertheless still claims to be applying the law.<sup>103</sup>

Inaction on the AUMF will enable future administrations to justify overreach in the Middle East or elsewhere at the expense of U.S. national security, international norms and Constitutional imperatives while still claiming legality. Such action will set dangerous precedents that eviscerate the separation of powers to create an infinite state of exception. Congress must make the case that the executive is no longer applying the law and force a new debate to reclaim control of the war on terror. Congress must prevent the United States from enflaming terrorism, neglecting strategic objectives, and inflicting further damage upon our Democracy.

<sup>1</sup> Authorization for Use of Military Force. Pub. L. 107-40. 115 STAT. 224. 18 September 2001. *ProQuest Congressional Publications*. Web. 25 Sept. 2016.

<sup>2</sup> Abramowitz, David. "The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism." *Harvard International Law Journal* 43 (2002): 73. Print.

<sup>3</sup> Abramowitz, "The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism." 74

<sup>4</sup> *Ibid.*

<sup>5</sup> Priest, Dana & Arkin, William M. "A hidden world, growing beyond control." *The Washington Post*, July 19, 2010. <https://goo.gl/hiX4>.

<sup>6</sup> U.S. Congress, *Congressional Record*. "Authorizing Use of United States Armed Forces Against Those Responsible for Recent Attacks Against the United States." Vol. 147 No. 120 Pg. H5638.

<sup>7</sup> *Ibid.*

<sup>8</sup> Byman, Daniel. "Beyond Counterterrorism." *Foreign Affairs*. Vol. 94, No. 6. (November/December 2015): 11-18.

<sup>9</sup> *Ibid.*

<sup>10</sup> Fuller, Jamie. "'ISIS' vs. 'ISIL' vs. 'Islamic State': The political importance of a much-debated acronym." *The Washington Post*, September 9, 2014. <https://goo.gl/q9hNPq>. Although the acronym debate between ISIS and ISIL is contentious, I will defer to the Obama Administration's because it denotes the larger area (the Levant, a large region in the eastern Mediterranean) that the terrorist group covers.

<sup>11</sup> Foucault, Michel. *The Essential Foucault* (New York: The New Press, 2003). Ed. Paul Rabinow and Nikolas Rose, 305.

<sup>12</sup> *Ibid.* Although it is true that Foucault focuses on the shift away from sovereign power, Agamben argues that exceptional sovereign power is a prerequisite for the juridical order that gives rise to and helps us understand biopolitics in modernity.

<sup>13</sup> Agamben, Giorgio. *State of Exception*. (Chicago: University of Chicago Press, 2005), 40.

<sup>14</sup> Tharoor, Ishaan. "To no one's surprise, Erdogan backs extending Turkey's state of emergency." *The Washington Post*, September 29, 2016. <https://goo.gl/77anKh>.

<sup>15</sup> The Economist. "Turkey's Kurds are caught between an insurgency and a crackdown." *The Economist*, October 21, 2016. <https://goo.gl/2QFqtm>.

<sup>16</sup> Agamben, *State of Exception*, 35.

<sup>17</sup> U.S. Const. art. I, § 8, cl. 1.

<sup>18</sup> U.S. Const. art. I, § 8, cl. 11.

<sup>19</sup> U.S. Const. art. I, § 8, cl. 12.

<sup>20</sup> U.S. Const. art. II, § 2, cl. 1.

<sup>21</sup> Gonzalez, Alberto R. "Advising the President: The Growing Scope of Executive Power to Protect America." *Harvard Journal of Law & Public Policy* 38, no. 2, 453-507.

<sup>22</sup> The Supreme Court recognized the Constitution's power to restrict Presidential war powers first in 1804 in *Little v. Barreme*, which it reaffirmed in *Zivotofsky ex rel. Zivotofsky v. Kerry*.

<sup>23</sup> Farrier, Jasmine. "The Contemporary Presidency: Judicial Restraint and the New War Powers." *Presidential Studies Quarterly* 46, no. 2 (June 2016): 390.

<sup>24</sup> U.S. Congress, *War Powers Resolution*. Pub. L. No. 93-148, 87 Stat. 555.

<sup>25</sup> Johnson, Lyndon B. Message to Congress August 5, 1964. <https://goo.gl/C2qdFH>.

<sup>26</sup> See note 24.

<sup>27</sup> See note 1, 2001 AUMF § 2 (b) (1), (2).

<sup>28</sup> Patera, John. "War Powers Resolution in the Age of Drone Warfare: How Drone Technology Has Dramatically Reduced the Resolution's Effectiveness as a Curb on Executive Power." *Hamline Journal of Public Law & Policy* 33, no. 2: 421. (2012).

<sup>29</sup> Bradley, Curtis A. and Goldsmith, Jack L. "Obama's AUMF Legacy." 24 Aug. 2016. Available at SSRN: <http://ssrn.com/abstract=2823701>. 2.

<sup>30</sup> Bradley and Goldsmith, "Obama's AUMF Legacy." 3-4.

<sup>31</sup> Sky, Emma. *The Unraveling: High Hopes and Missed Opportunities in Iraq*. (New York: Public Affairs, 2015), 360.

<sup>32</sup> Sky, *The Unraveling*, 360.

<sup>33</sup> Sky, *The Unraveling*, 360.

<sup>34</sup> U.S. Library of Congress, Congressional Research Service, *Al Qaeda and U.S. Policy: Middle East and Africa*, by Carla E. Humud, R43756 (2016), 3.

<sup>35</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006) (holding that the United States is in a non-international armed conflict with al Qaeda).

<sup>36</sup> Holder, Eric. "Attorney General Eric Holder Speaks at Northwestern University School of Law." March 5, 2012. 1. <https://goo.gl/zMiuCs>.

<sup>37</sup> See Roberts, Alasdair. "The War We Deserve." *Foreign Policy* 2007: 44. *JSTOR Journals*. Web. 2 Oct. 2016. Roberts explains that After the Gulf War and the rise of neoliberalism, we developed the mentality that quick military interventions were not only possible, but easy. While it is true that administration officials at the time deserve their fair share of criticism for the war in Iraq and on terror generally, Roberts argues that people expected too much for far too little sacrifice or societal mobilization as in previous generations.

<sup>38</sup> Rona, Gabor. "Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror.'" *The Fletcher Forum of World Affairs*, Vol. 27:2, Summer/Fall 2003. 63.

<sup>39</sup> Chadwick, Elizabeth. *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict*. (Boston: M. Nijhoff, 1996), 128. Both countries stated: "the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."

<sup>40</sup> BBC. "The Troubles." 2016. <http://www.bbc.co.uk/history/troubles>.

<sup>41</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

<sup>42</sup> Ingber, Rebecca. "International Law Constraints as Executive Power." *Harvard International Law Journal* 57, no. 1: 63 (2016). The Court "explained its extension of the AUMF to include detention by referencing... 'long- standing law-of-war principles,' invoking prior case law and treaties on the laws of war, as well as provisions addressing combatant detention in international treaties such as The Hague and Geneva Conventions."

<sup>43</sup> Posner, Eric. "Terrorism and the Laws of War," *Chicago Journal of International Law*, Vol. 5, No. 2, 423-434 (2005), 434.

<sup>44</sup> Johnson, Jeh. C. "The conflict against al Qaeda and its affiliates: how will it end?" Speech at the Oxford Union, Oxford University. November 30, 2012. 8-9. <https://goo.gl/pdhGat>.

<sup>45</sup> Johnson, Speech at Oxford University, 9.

<sup>46</sup> Jurdi, Nidal N. "The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon." *Journal of International Criminal Justice* 5 (2007), 1126.

<sup>47</sup> Jurdi, "The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon," 1137.

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- <sup>48</sup> Lippman, Matthew. "The New Terrorism and International Law." 10 TULSA J. COMP. & INT'L L. 297, 354 (2003).
- <sup>49</sup> Chan, Sewell and Simons, Marlise. "South Africa to Withdraw from International Criminal Court." *The New York Times*, October 21, 2016. <https://goo.gl/vke6nC>.
- <sup>50</sup> U.S. Congress, Senate, Armed Services Committee, *Worldwide Threat Assessment of the U.S. Intelligence Community*, James Clapper, February 9, 2016. 4. <https://goo.gl/WkCHAI>.
- <sup>51</sup> Johnson, Jeh. C. "National Security Law, Lawyers and Lawyering in the Obama Administration." Speech at Yale Law School. February 22, 2012. 7. <https://goo.gl/MXHDU5>.
- <sup>52</sup> *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010).: 2.
- <sup>53</sup> Roberts, John G. "What Makes the D.C. Circuit Different? A Historical View." *Virginia Law Review*, Vol. 92, No. 3, May 2005.
- <sup>54</sup> See note 1.
- <sup>55</sup> Fleck, Dieter. *Handbook of International Humanitarian Law*. (Oxford University Press, 2008) 173, 576–7.
- <sup>56</sup> Ohlin, Jens David. "Targeting Co-Belligerents." (2011). Cornell Law Faculty Working Papers. Paper 92. 70-71.
- <sup>57</sup> Fleck, *Handbook of International Humanitarian Law*, 576–7.
- <sup>58</sup> See note 29 at 6.
- <sup>59</sup> *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010).: 7
- <sup>60</sup> See notes 20, 25, and 28.
- <sup>61</sup> *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010).
- <sup>62</sup> Vladeck, Stephen I. "The D.C. Circuit After Boumediene." *Seton Hall Law Review*, Vol. 41, 1462-1463, (2011).
- <sup>63</sup> *Ibid*.
- <sup>64</sup> Ohlin, "Targeting Co-Belligerents." 72.
- <sup>65</sup> Schmitt, Eric. "Al Qaeda Turns to Syria, with a Plan to Challenge ISIS." *The New York Times*. May 15, 2016. <http://nyti.ms/1V4UFoL>.
- <sup>66</sup> Lister, Charles. "Al Qaeda is About to Establish and Emirate in Northern Syria." *Foreign Policy*, May 4, 2016. <https://goo.gl/1EeKf7>.
- <sup>67</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1298, 1562 (2011) (codified at 10 U.S.C. § 801 note).
- <sup>68</sup> Obama Administration. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, In re: Guantanamo Bay Detainee Litigation at 1 (D.D.C. Mar. 13, 2009), at <https://goo.gl/TmEPmB>.
- <sup>69</sup> Representative Berman and Representative Van Hollen, speaking on National Defense Authorization Act for Fiscal Year 2012, on May 27, 2011, 112<sup>th</sup> U.S. Congress, 1<sup>st</sup> Sess., *Congressional Record* E962 and E988 respectively. Berman stated: "Sec. 1034 was advanced with no hearings in the Foreign Affairs Committee...and with only a passing mention in an Armed Services Committee hearing...There's been no floor debate beyond this amendment, and no opportunity for the Administration or outside experts to weigh in. This is not the way Congress should authorize an expansion of the President's authority to use force. And make no mistake: that's exactly what we're doing here, even if the proposed authority is consistent with how courts have interpreted the original AUMF." Van Hollen stated: "This language authorizes the Executive to launch military action against an entity that had nothing to do with the attacks of September 11, 2001..."

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- <sup>70</sup> U.S. Congress, House, Committee on Armed Services, *War on Terror Detention and Prosecution Assessment*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., 2011.
- <sup>71</sup> Chesney, Robert M. "Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism." *Michigan Law Review* 112-220, (2013).
- <sup>72</sup> U.S. Congress, Senate, Committee on Foreign Relations, *Authorization for Use of Military Force*, 113<sup>th</sup> Cong., 2<sup>nd</sup> sess., 2014.
- <sup>73</sup> Quandt, William B. *Peace process: American diplomacy and the Arab-Israeli conflict since 1967*. (Berkeley: University of California Press, 2005), 7.
- <sup>74</sup> See for a selection of recent books that detail the ambiguities and moral hazards of drone warfare: Freedman, Lawrence D. "The Drone Revolution." *Foreign Affairs* 95, no. 6: 153. (2016)
- <sup>75</sup> Agamben, *State of Exception*, 40.
- <sup>76</sup> U.S. Const., art. I, § 8.
- <sup>77</sup> Obama Administration. "Legal Basis for U.S. Military Operations in Syria." September 2014. Obtained by NBC News, 1.  
[https://dl.dropboxusercontent.com/u/61712035/Legal%20Basis%20for%20Operations\\_Collective%20Documents.pdf](https://dl.dropboxusercontent.com/u/61712035/Legal%20Basis%20for%20Operations_Collective%20Documents.pdf)
- <sup>78</sup> Weiss, Michael, and Hassan, Hassan. *ISIS: Inside the Army of Terror*. (New York, N.Y.: Regan Arts, 2015), 197
- <sup>79</sup> See note 64.
- <sup>80</sup> Weiss and Hassan, *ISIS: Inside the Army of Terror*, 64.
- <sup>81</sup> Congressional Research Service, *Al Qaeda and U.S. Policy: Middle East and Africa*, by Carla E. Humud, 4.
- <sup>82</sup> OSE Report GMP20130409405003, "ISI Emir Declares ISI, Al-Nusrah Front: 'Islamic State of Iraq and the Levant,' April 9, 2013.
- <sup>83</sup> Al Jazeera. "Al-Qaeda disowns ISIL rebels in Syria." *Al Jazeera*, February 3, 2014.  
<https://goo.gl/TCzEWY>.
- <sup>84</sup> Weiss and Hassan, *ISIL: Inside the Army of Terror*, 185.
- <sup>85</sup> *Ibid*.
- <sup>86</sup> Sly, Liz. "Al-Qaeda Disavows Any Ties with Radical Islamist ISIS Group in Syria, Iraq." *The Washington Post*. February 3, 2014.
- <sup>87</sup> Stern, Jessica, and J. M. Berger. *ISIS: The State of Terror* (New York, N.Y.: Ecco Press, 2015), 180.
- <sup>88</sup> *Ibid*.
- <sup>89</sup> Obama Administration. "Legal Basis for U.S. Military Operations in Syria." September 2014. Obtained by NBC News, 2.  
[https://dl.dropboxusercontent.com/u/61712035/Legal%20Basis%20for%20Operations\\_Collective%20Documents.pdf](https://dl.dropboxusercontent.com/u/61712035/Legal%20Basis%20for%20Operations_Collective%20Documents.pdf)
- <sup>90</sup> Weiss and Hassan, *ISIL: Inside the Army of Terror*, 197.
- <sup>91</sup> Stern and Berger, *ISIS: The State of Terror*, 195.
- <sup>92</sup> Cronin, Audrey Kurth. "ISIS Is Not a Terrorist Group." *Foreign Affairs* 94, no. 2 (March 2015): 87.
- <sup>93</sup> Cronin, "ISIS is Not a Terrorist Group," 88.
- <sup>94</sup> See note 76.
- <sup>95</sup> Obama Administration. "Joint Resolution To authorize the limited use of the United States Armed Forces against the Islamic State of Iraq and the Levant." February 11, 2015.  
<https://goo.gl/8KQVep>

<sup>96</sup> Obama, Barack H. “Letter from the President -- Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant.” The White House, Office of the Press Secretary, February 11, 2015. <https://goo.gl/QdGECR>.

<sup>97</sup> U.S. Congress, Senate, Committee on Foreign Relations, *Sen. Bob Corker Holds a Hearing on The President's Request for Authorization to Use Force Against ISIS*, 114<sup>th</sup> Cong., 1<sup>st</sup> sess., 2015.

<sup>98</sup> Glennon, Michael J. Amicus Curiae, *Smith v. Obama*, Civ. No. 16-843, (2016).  
<https://goo.gl/ziNTsW>.

<sup>99</sup> See note 22, §8(a)(1).

<sup>100</sup> Locke’s notion of executive prerogative (where the executive can “act according to discretion, for the public good, without the prescription of the law, and sometimes even against it”) is meant to apply to situations in which the executive cannot consult other parts of government or the people, and the decision is not ongoing. Moreover, the 21<sup>st</sup> century and war on terrorism is far different than the conditions Locke assumed. First, the U.S. is a Constitutional Democracy created expressly to reject Lockean notions of executive or monarchical prerogative. Second, the executive is repeatedly in contact (as opposed to meeting annually, etc.) with congress (which is continuously in session). This means that there is no need for the executive to exercise his prerogative (if one believes that such prerogative is not extra-legal in the first place). Third, the courts have had the opportunity to rule on the question.

<sup>101</sup> Rosenberg, Matthew & Haberman, Maggie. “Michael Flynn, Anti-Islamist Ex-General, Offered Security Post, Trump Aide Says.” *The New York Times*, November 17, 2016.

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<sup>102</sup> Chesney, Robert; Goldsmith, Jack; Waxman, Matthew C.; Wittes, Benjamin. “A Statutory Framework for Next-Generation Terrorist Threats.” *Hoover Institute Jean Perkins Task Force on National Security and Law*, February 25, 2015. The authors outline several conditions: tying the Authorization to Article II or International Law, specifying Terrorist groups and geographic areas, identifying specific criteria for targeted killings, implementing a review process, and adding a sunset clause (which makes the resolution expire at the end of a specified period) to ensure a continuous debate in congress.

<sup>103</sup> Agamben, *State of Exception*, 87.

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